Supreme Court, U. S.
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No. 96-746

In The

Supreme Court of the United States

October Term, 1996

CANADIAN CONSULATE,

Petitioner,

vs.

ARLENE HOLDEN,

Respondent.

On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a foreign state's termination of the employment of a United States citizen who had been engaged in the promotion of commercial products and had not been employed as a civil servant or as a diplomat constitutes a commercial activity excepting the foreign state from immunity under the Foreign Services Immunities Act.

LIST OF PARTIES

The parties in this proceeding are Petitioner Canadian Consulate and Respondent Arlene Holden.

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H. Rep. No. 94-1487, 94th Cong., 2d Sess. at 16, reprinted at 1976 U.S. Code Cong. & Ad. News 6604 7

Respondent Arlene Holden respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the Ninth Circuit's Opinion below. That Opinion is reported at 98 F.3d 918 (9th Cir. 1996) and is reprinted in the Petition for Writ of Certiorari at 126-137.

STATUTORY PROVISIONS INVOLVED

In addition to those statutes cited by Petitioner, the following statutory provisions, from the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602, § 1603, and § 1606 are involved in this case:

> Section 1602. Findings and Declaration of Purpose.
>
> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 USCS §§1602 et seq.].

Section 1603. Definitions

For purposes of this chapter [28 USCS §§1602 et seq.] --

(a) A "foreign state", except as used in Section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subdivision (b).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territories and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Section 1606. Extent of Liability.

As to any claim for relief with respect to which a foreign state is not entitled to immunity under §1605 or §1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances;

. . . .

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari because the decision below presents no conflict with the law of other Circuits nor infringes upon the sovereign prerogatives of foreign states.

On November 9, 1993, Respondent Arlene Holden filed a wrongful termination action against the Canadian Consulate. That complaint stated five causes of action against the Canadian Consulate: sex discrimination, age discrimination, violation of

public policy (California public policy prohibiting sex discrimination and age discrimination in employment), breach of the implied contract to terminate only for cause, and breach of the covenant of good faith and fair dealing. Ms. Holden's claims were the result of the Canadian Consulate's termination of her long-term employment as a Commercial Officer. In the Spring of 1993, the Canadian Consulate decided to down-size and required that Holden compete with a younger man for the one remaining Commercial Officer position. The younger man, age thirty-two and with the Consulate for only two-and-one-half years, was retained for the position while Ms. Holden, age fifty-seven and with the Consulate for thirteen years, was laid off.

Subsequent to the filing by Ms. Holden of her Complaint for Damages, Petitioner moved to dismiss under Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction contending it was immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). In an order dated July 25, 1994, the District Court identified the existence of a disputed issue of fact as to the nature and scope of Respondent's activities with the Canadian Consulate and required that the parties appear for an evidentiary hearing on this issue.

An evidentiary hearing was held on September 8, 1994 and September 9, 1994. Testimony was obtained from Kenneth David McNamara, the former Consul and Senior Trade Commissioner of the Canadian Consulate in San Francisco who had been Respondent's supervisor for a period of time and was one of the individuals involved in the decision to terminate Ms. Holden's employment. Testimony was also obtained from Ms. Holden herself. Documents, including Ms. Holden's job description, resume and a letter of reference prepared by Mr. McNamara for Ms. Holden regarding her former employment with the Canadian Consulate and the responsibilities she held, were made exhibits.

A. The District Court's Findings Of Fact

On November 1, 1994, the district court issued Findings of Fact and Conclusions of Law and denied the motion to dismiss. Petition at 126-137.

The court expressly found that Respondent, a United States citizen, was employed by Claimant, a foreign state as that term is defined under the FSIA, as a Commercial Officer between February 1980 and March 31, 1993. Petition at 127. The Court further noted that, at the time of Holden's hire, the Canadian Consulate had sought as Commercial Officers individuals, such as Holden, who were experts in local marketing and business. *Id.* at 128.

The San Francisco Consulate had employed Holden in the capacity of locally-engaged staff. As a United States citizen, Holden could not be employed in any capacity other than that of locally-engaged staff. *Id.* at 129. The Canadian Consulate treated its locally-engaged staff in a manner different from that in which it treated its foreign service employees: different regulations applied to locally-engaged staff than to foreign service employees; locally-engaged staff were entitled to overtime; locally-engaged staff did not receive any housing assistance or any private schooling for their children from the Canadian government; and locally-engaged staff were not permitted in the Consulate outside the presence of a Foreign Service Officer. *Id.*

The District Court determined that Holden had not been employed by the Consulate in the capacity of a civil servant. She did not compete for any examination prior to obtaining her position with the Consulate. She was not entitled to tenure in her position. She was not provided with the same benefits as that provided foreign service officers. She did not receive any

civil service protections from the Canadian government. *Id.* at 130. Finally, the Court determined that Holden had performed commercial and private activities, not noncommercial and governmental activities for Respondent. *Id.* Specifically, the Court determined that Holden had been primarily engaged in promoting and marketing. She had not been involved in policy-making for the Canadian Consulate had not been privy to any governmental policy deliberations, and had not engaged in any lobbying activity or legislative work for the government. *Id.* The Court set forth, in some detail, the activities in which Holden had been involved. *Id.* at 130-131.

Based on the nature of Holden's activities, the District Court denied Respondent's motion to dismiss, finding that Holden's employment activities were private and commercial in nature, and that the commercial activity exception under the FSIA applied, thus denying immunity from suit to the Consulate.

Petitioner obtained interlocutory review of the district court's order under the collateral order doctrine. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991). The United States Court of Appeals for the Ninth Circuit affirmed the lower court decision.

B. Reiteration Of The Lower Court's Findings By The Ninth Circuit

The Ninth Circuit reiterated the basic facts as found by the lower court. Because the statutory language at issue required that a plaintiff's cause of action be "based upon" the commercial activity in question (*Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 187, 133 L. Ed. 2d 124 (1995)), the Court recognized that Holden's claim would be "based upon" those activities forming the elements of the claim that would entitle her to relief. *Saudi*

Arabia v. Nelson, 507 U.S. 349, 356-357, 113 S. Ct. 1471, 1477 (1993). Noting that Holden did not challenge the right of Canada to close its consulate, but rather challenged the fact that she was terminated while a younger man was not, the court found Holden's employment to constitute the activity in question.

In determining whether Holden's employment involved a commercial activity the Ninth Circuit adopted the lower court's factual findings, reviewed the nature of Holden's activities, and, additionally, referred to the legislative history of the FSIA. The court adopted the standard suggested by the report of the Committee on the Judiciary of the House of Representatives of the 94th Congress: "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States." H. Rep. No. 94-1487, 94th Cong., 2d Sess. at 16, reprinted at 1976 U.S. Code Cong. & Ad. News 6604, 6615. The court further cited additional language within the House Report: "Activities such as a government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition [of commercial activity]." *Id.*

Noting that the Seventh Circuit in *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987), had already adopted the analytical framework set forth in the House Report, the court agreed that a determination should be made as to whether Holden had been employed as a civil servant or a diplomatic officer.

The court affirmed the lower court's findings as to the nature of the activities in which Holden had been engaged and that Holden had not been employed as a civil servant. After a full

examination of the facts, the court held that Holden's employment constituted a commercial activity, rendering the Canadian Consulate subject to suit by her.

On August 9, 1996, the Ninth Circuit filed its opinion affirming the lower court's judgment. On November 7, 1996, Petitioner filed the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

BECAUSE PETITIONER'S STATUS AS A CONSULATE IS IRRELEVANT TO DETERMINING EXCEPTIONS TO IMMUNITY, NO NOVEL ISSUES ARE PRESENTED BY THE PETITION.

A. Petitioner's Status As A Consulate Is Irrelevant.

While it is initially presumed that a foreign state is immune from suit, that presumption will be lost where a party presents evidence that one of the FSIA's exceptions to immunity applies. 28 U.S.C. § 1604; *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). Once a plaintiff has proffered evidence of an exception to immunity, the foreign state must establish by a preponderance of the evidence that such an exception does not apply. Petitioner has twice failed to meet this burden. *Id.*

There is no dispute as to Petitioner's status as a foreign state.[1] Once an entity's status as a foreign state has been confirmed, determinations as to immunity are made regardless of whether the foreign state entity is a political subdivision or

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1. For purposes of the FSIA, a foreign state includes even those entities that are political subdivisions, agencies, or instrumentalities of a foreign state. 28 U.S.C. § 1603(a).

an agency or an instrumentality. 28 U.S.C. § 1605.[2] In other words, exceptions to immunity will be determined without reference to whether the foreign state is a Consulate, a Commercial Office, or a State Bank. The determination can only be based upon whether the particular conduct giving rise to the claim in question constitutes or is in connection with a commercial activity. 28 U.S.C. § 1605(a)(2); *Joseph, supra,* 830 F.2d at 1023. Petitioner's status as a Consulate[3] and not a company is irrelevant for the determination of whether an exception to immunity exists. *Berdakin v. Consulado de la Republica de El Salvador,* 912 F. Supp. 458, 461 (C.D. Cal. 1995).

Petitioner essentially argues that this Court should grant its Petition in order to decide issues of policy. However, by virtue of the command of the FSIA that issues of exceptions to immunity be decided regardless of the type of foreign state entity involved, no policy issue has been or can be presented. Rather, the only issue presented to the Ninth Circuit and to this Court is

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2. The FSIA distinguishes types of "foreign states" only in § 1608, a section not here at issue.

3. Petitioner's references to the Vienna Convention on Consular Relations, while providing an interesting historical note and an explanation of the role of a Consulate, is of no assistance in determining the issue of Petitioner foreign state's immunity from suit. A foreign state's immunity from suit is determined only pursuant to the FSIA. The immunities set forth in the Vienna Convention, on the other hand, apply only to consular officials and employees. *Joseph, supra,* 830 F.2d at 1021. Furthermore, Petitioner's reference to Consular functions and to obligations of the receiving state improperly focuses upon what the United States Court of Appeals for the District of Columbia Circuit has referred to as "auxiliary provisions" which are of no assistance in determining the essential character of the agreement, *i.e.*, its commercial or noncommercial status. *Practical Concepts, Inc. v. Republic of Bolivia,* 811 F.2d 1543, 1548, 1549 (D.C. Cir. 1987) (Ginsburg, J.).

whether the employment of Arlene Holden, and the termination thereof, constitutes a commercial activity.

The District Court, after a full evidentiary hearing, made factual and legal determinations. These factual and legal determinations were affirmed by the Ninth Circuit. At no time has Petitioner even attempted to argue that the District Court clearly erred in its findings of fact. Fed. R. Civ. P. 52(a); *United States v. United States Gypsum Company,* 333 U.S. 364, 395 (1948); *Louisiana-Pacific Corp. v. Asarco, Inc.,* 24 F.3d 1565, 1576 (9th Cir. 1994). Thus, the only issue presented under the FSIA was and is whether, under the particular fact situation presented, the foreign state is excepted from immunity — not whether a Consulate, by virtue of its status as a Consulate, is automatically immune from suit regardless of the FSIA.

B. Immunity Determinations May Not Be Based Upon A Foreign State's Rationale Or Defense For Its Conduct Nor Upon Policy Considerations.

The Consulate also argues that this Court should grant the Petition for Writ of Certiorari in order that it might find immunity under § 1605(a)(2) so as to avoid intrusive pre-trial discovery. Petition at 12-14. Even the most basic reading of the Foreign Sovereign Immunities Act makes clear that, for purposes of determining subject matter jurisdiction, a foreign state's rationale for its act plays no role. Indeed, this Court has previously held that motivation or affirmative defenses, other than that relating to subject matter jurisdiction, are irrelevant at this stage. *Republic of Argentine v. Weltover, Inc.,* 504 U.S. 607, 614 (1992). Furthermore, the plain language of the FSIA makes clear that, once a foreign state has been found to have lost its immunity, it must be treated in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 1606.

Indeed, accepting either of Petitioner's arguments, that its status as a Consulate should automatically render it immune from suit or that concerns as to the extent of pre-trial discovery should make it immune from suit, would, in large measure, read the commercial activity exception out of the law, essentially producing a finding that no matter what activity is involved, a Consulate will always be immune from suit under the FSIA. *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985). Nowhere, either on the face of the FSIA or in its legislative history, does such an intent appear.

II.

THE LOWER COURT'S DECISION IS FULLY CONSISTENT WITH DECISIONS BY OTHER CIRCUIT COURTS.

The Ninth Circuit determined that Respondent's claims against Petitioner were "based upon" her employment. To determine whether Respondent's employment constituted a commercial activity under the FSIA, the court considered the factual findings made by the district court, *i.e.*, that Respondent's activities were primarily promoting and marketing, that she had not been involved in any policy-making, had not been privy to any governmental policy deliberations, had not engaged in any lobbying activity or legislative work for Canada, could not speak for the Canadian government, and was not even allowed in the Consulate unless in the company of a Foreign Service Officer. Petition at 111. The Court determined the nature of Holden's work, promotion of products, to be the type of work regularly done by private persons and, thus, a commercial activity. *Id.* at 112. The Court accepted the lower court's factual finding that Respondent was not a civil servant and further determined, on its own, that Respondent had not been employed by the Canadian

Consulate as a diplomat.[4] Based upon these facts, the Court agreed with the lower court that the commercial activity exception to immunity applied.

The Ninth Circuit's decision in this matter is fully consistent with decisions of other circuits. For example, the Seventh Circuit underwent an analysis similar to that engaged in by the Ninth Circuit when it determined that a third-party national could proceed on his claims of wrongful termination against the Commercial Office of Spain.[5] *Segni v. Commercial Office of Spain,* 835 F.2d 160 (7th Cir. 1987). While the Second Circuit has not yet addressed this issue, the United States District Court for the Southern District of New York has permitted a former secretary to pursue sexual harassment claims against an instrumentality of a foreign state.[6] *Zveiter v. Brazilian Nat. Superintendency,* 833 F. Supp. 1089, 1093 (S.D.N.Y. 1993).

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4. Petitioner itself concedes that it had not employed Respondent as a diplomat. Petition at 16, note 21.

5. That same circuit, the previous year, had determined that claims of unfair labor practices could be brought against the State Bank of India whose employees were United States citizens or United States residents awaiting naturalization, who lived and worked in the United States, who were subject to the obligations and responsibilities of United States citizens, and who were entitled to the protections and benefits provided by United States law. *State Bank of India v. N.L.R.B.,* 808 F.2d 526 (7th Cir. 1986), *cert. denied,* 483 U.S. 1009 (1987).

6. Unlike the lower court in the instant action, the District Court of New York went a step further and found that the employment of a United States citizen by a foreign state constitutes a commercial activity. In another recent decision, the Ninth Circuit, relying in part upon the House Report accompanying the FSIA and upon the Seventh Circuit's decision in *State Bank of India v. N.L.R.B.,* (*supra,* 808 F.2d at 535) similarly found the employment of United States residents to be "well-established as constituting a commercial activity." *Gates v. Victor Fine Foods, supra,* 54 F.3d at 1463.

In 1995, the District of Columbia Circuit found there to be nothing "peculiarly sovereign" about unilaterally terminating an employment contract between a foreign state university and its employees. *Janini v. Kuwait University,* 43 F.3d 1534 (D.C. Cir. 1995). Additionally, the District of Columbia Circuit has found a contract between two agencies for consulting services to constitute a commercial activity. *Practical Concepts, supra.*

As Petitioner points out, the District of Columbia Circuit has also determined that other wrongful termination claims, by virtue of the status of the plaintiffs, were not based upon commercial activities. *See, e.g., Broadbent v. Organization of American States,* 628 F.2d 27 (D.C. Cir. 1980). As ably noted by the Ninth Circuit in its decision below, *Broadbent* involved no commercial activity because the plaintiffs, unlike Respondent Holden, were employed as civil servants. *Broadbent,* 628 F.2d at 33.

Although the lower court did not mention it in its decision, an additional ground exists for distinguishing Respondent's claims against Petitioner from those brought in either *Broadbent* or the other two decisions from the District of Columbia Circuit: *Tuck v. Pan American Health Org.,* 668 F.2d 547 (D.C. Cir. 1981) or *Morgan v. International Bank for Reconstruction and Dev.,* 752 F. Supp. 492 (D.D.C. 1990). Specifically, these cases involved claims brought against international organizations pursuant to the International Organizations Immunity Act, 22 U.S.C. § 288. The present action involves claims made against a foreign state pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602.

International organizations operate subject to a set of rules and immunities different from those of foreign states.[7] In

7. An excellent summation of the atypical situation of international (Cont'd)

deference to the status of international organizations and as a result of the existence of a separate Act relating to international organizations (the International Organizations Immunity Act), the Foreign Sovereign Immunities Act is silent regarding international organizations — § 1603 of the FSIA, the definitional section, makes no mention of such entities.

Recognizing the distinction between international organizations and foreign states, the District of Columbia Circuit in *Broadbent* noted that "foreign states are free to conduct 'governmental' matters through their own citizens" while international organizations are not. *Broadbent, supra,* 628 F.2d at 34. The court inferred congressional intent to apply "commercial activity" status to a foreign state's employment of American citizens, and not to an international organization's employment of such individuals, due primarily to the fact that employees of international organizations are invariably drawn from either American citizens or third-country nationals, while a foreign state has the option not to employ such individuals. *Id.* The court further noted that a foreign state's employment of United States citizens or third-country nationals constitutes a commercial activity. *Id.* at 34. Indeed, *Broadbent* specifically limited its finding of non-commercial status to international organizations. *Id.* at 35 and 36.

The remaining cases cited by Petitioner, *Tuck* and *Morgan*,

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(Cont'd)
organizations can be found in *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). The unique laws and immunities extended to international organizations stem from the goal of achieving coordinated international action through multi-national organizations. These organizations necessarily cannot be tied to any particular state or country and must draw their employees from the citizens of the world — unlike foreign states which have the option of employing citizens of their own country. *See, e.g., Broadbent, supra,* 628 F.2d at 34.

deal solely with the issue of the employment practices of international organizations. Like *Broadbent*, both found employment as part of the civil service of an international organization could not constitute a commercial activity.

III.

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH ANY OTHER COURT'S APPLICATION OF THE FSIA'S LEGISLATIVE HISTORY PERTAINING TO EMPLOYMENT ACTIVITIES.

In its decision below, the Ninth Circuit, like courts before it, reviewed both the nature of the activity presented and the language of the FSIA's legislative history to determine whether the commercial activity exception to immunity applied. While Congress indicated its intent that courts have a "great deal of latitude in determining what is a 'commercial activity'[8], court decisions have been fairly consistent in such determinations. *See, e.g., State Bank of India, Zveiter, Janini, Practical Concepts,* cited *supra* in Section II. Indeed, the only conflict Petitioner notes is a conflict which Congress intended to exist, namely, the distinctions between international organizations and foreign states. Clearly, the legislative history relating to the passage of the FSIA should play no role in interpreting any immunities, or exceptions thereto, provided by the International Organizations Immunity Act.

Finally, contrary to Petitioner's assertions, the lower court did not rely exclusively on Respondent's civil service or diplomatic status. Rather, the lower court reviewed the District Court's factual findings and actively considered the nature of Holden's employment activities. Petition at 111-112. The lower

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8. Petition at 142.

court found the commercial activity exception to apply based not only upon Respondent's non-civil service and non-diplomatic status, but also upon the specific nature of her work, i.e., the promotion of products. *Id.* at 112.

The Ninth Circuit, in referring to and utilizing relevant sections of the House Report, engaged in a practice approved by this Court. "As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent." *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 610 (1991).

After determining that Respondent's cause of action was based upon her employment and recognizing the factual findings of the District Court, the Ninth Circuit employed the analytical framework utilized by the Seventh Circuit, found Respondent's employment akin to that of a marketing agent (such as the Plaintiff in *Segni, supra*), agreed with the lower court that Respondent had not been employed in civil service, made the additional determination that Respondent had not been employed as diplomatic personnel, and found that the nature of the activities involved were commercial and non-governmental. In so doing, the court abided by those principles expressed both in §1605(a)(2) and the legislative history.

The lower court performed exactly that function envisioned by the FSIA, namely, it reviewed the facts at issue and conducted a full analysis of the nature of the activities involved. Petitioner can point to no conflict between circuits nor to any conflict in the application of the legislative history of the FSIA nor to any error on the part of the lower court.

CONCLUSION

For all the foregoing reasons, the petition for writ certiorari should be denied.

Respectfully submitted,

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